STATE OF MICHIGAN

COURT OF APPEALS

GWYN DAVIDSON,

Plaintiff-Appellee,

v

DENNIS BELLEHUMEUR,

Defendant-Appellant,

and

GARY SHULTE, PERSONAL THERAPISTS, INC., STAFFCO SERVICES, INC., and MEDI STAFF, INC.,

Defendants.

UNPUBLISHED
July 30, 2002

No. 222814
Wayne Circuit Court
LC No. 95-537258-CZ

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

O'CONNELL, J. (*dissenting).*

I respectfully dissent. Plaintiff and defendant entered into a settlement agreement where plaintiff agreed to dismiss her claims against defendant. As a result, the trial court entered a stipulated order of dismissal with prejudice. In my opinion, the trial court abused its discretion when it decided to set aside the order of dismissal. An agreement to settle a pending lawsuit is a contract. The present record is devoid of any "extraordinary circumstances" that would allow the trial court to set aside the settlement agreement. The plaintiff and defendant should be required to adhere to the terms and conditions of their settlement agreement.

Plaintiff filed suit against defendants in December 1995 in Wayne Circuit Court alleging that defendants breached their contract with plaintiff promising to pay her for unused sick and vacation days. Plaintiff's claims against Staffco Services, Inc., and Medi Staff, Inc., were dismissed without prejudice in an order entered by the trial court on September 17, 1996 with the parties' stipulation. Plaintiff and the remaining defendants then entered into a settlement agreement where plaintiff agreed to dismiss her claims against defendants in consideration for $7,500, paid in four monthly payments of $1,875. As a result, the trial court entered a stipulated order dismissing, with prejudice, plaintiff's claims against the remaining defendants. However, when defendant failed to make a payment pursuant to the settlement agreement, plaintiff moved

to set aside the order of dismissal in May 1997. For reasons unclear from the record, the trial court did not address the motion.

When defendant failed to make the third and fourth payments under the settlement agreement, plaintiff filed a motion to set aside the order of dismissal in November 1997 on the basis of MCR 2.612. Following a hearing the trial court granted plaintiff's motion without explanation.[1] On December 22, 1998, after defendant failed to respond to interrogatories and other requests for information, plaintiff filed a motion for default. The trial court granted plaintiff's motion for default in an order entered January 8, 1999, and scheduled a hearing on plaintiff's motion for default judgment. It appears from the record that before the hearing, defendant filed a motion for protective order or continuance, arguing that he had only learned of the default and impending default judgment approximately one week before the hearing on the default judgment. Defendant further contended that he was unaware of any legal proceedings that had occurred after the case was initially dismissed with prejudice pursuant to the settlement agreement. Nonetheless, on July 9, 1999, the trial court entered a default judgment against defendant in the amount of $33,000.[2] Defendant moved for relief from judgment pursuant to MCR 2.612 on July 26, 1999. During the hearing on the motion, defense counsel questioned the trial court's decision to set aside the order of dismissal and reopen the case on the basis of defendant's failure to proffer the required consideration. Without articulating its reasoning, the trial court subsequently denied defendant's motion in an order entered August 20, 1999.[3]

On appeal, defendant argues that the trial court abused its discretion in denying his motion for relief from judgment. "[A]lthough the law favors the determination of claims on the merits, it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999) (footnote and citations omitted). In the instant case, defendant framed his motion in a manner that implicated only MCR 2.612, the court rule governing relief from judgment.[4] We review for an abuse of discretion a trial court's ruling on a motion for relief from judgment. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

The court rule at issue in the present case, MCR 2.612(C)(1), provides in pertinent part:

> On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

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[1] The initial order setting aside the dismissal was entered December 12, 1997. The trial court later entered another order setting aside the dismissal on July 9, 1999.

[2] The July 9, 1999, order also denied defendant's motion to appear pro hac vice, for a protective order, and for a continuance of the June 25, 1999, hearing.

[3] For reasons unclear from the record, the trial court also entered an order denying defendant's motion to set aside the default judgment on September 21, 1999.

[4] It is unclear why defendant did not seek to set aside the default judgment on the basis of MCR 2.603(D).

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

In his brief on appeal, defendant maintains that the trial court improperly refused to grant relief from the default judgment. Specifically, defendant argues that he was entitled to such relief given that the default judgment followed from the trial court's erroneous decision to set aside the voluntary order of dismissal with prejudice. In this vein, defendant contends that after the order of dismissal was entered, plaintiff should have pursued other procedural remedies to enforce the terms of the settlement agreement rather than seeking to have the order of dismissal set aside. I agree.

As noted above, the trial court entered the stipulated order of dismissal with prejudice on January 2, 1997. In her May 13, 1997, motion to set aside the order of dismissal, plaintiff solely argued that the court should set aside the order of dismissal "to allow [plaintiff] to collect[ ] [the] . . . settlement amount" reflected in the parties' agreement. Plaintiff also argued that her motion was supported by MCR 2.612, but did not specify under what subsection of the rule she relied. Plaintiff later moved again to set aside the order of dismissal on November 20, 1997, advancing the same grounds for the motion. During the December 12, 1997, hearing on the motion, plaintiff's attorney advised the court that defendant had not tendered the consideration supporting the contract, and that plaintiff was seeking to set aside the order of dismissal on that basis. Although the trial court granted plaintiff's motion for relief from judgment, it did not specify what subsection guided its judgment. However, in her brief on appeal, plaintiff asserts that the trial court's judgment was supported by MCR 2.612(C)(1)(f), which provides that relief from judgment may be granted for "[a]ny other reason justifying relief from the operation of the judgment." Specifically, plaintiff maintains that the trial court's initial decision to reopen the litigation was proper to ensure that "justice [was] served."

I disagree with plaintiff that the trial court correctly decided to set aside the order of dismissal and reopen the litigation where the consideration supporting the settlement agreement was not paid in full. "[A]n agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Michigan Mutual Ins Co v Indiana Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001). Michigan law favors settlements and a party who proffers adequate consideration to support a settlement agreement is entitled to rely on its terms. *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 163; 458 NW2d 56 (1990); see also *Faith Reformed*

Church of Traverse City, Michigan v Thompson, 248 Mich App 487, 497; 639 NW2d 831 (2001). As plaintiff recognizes in her brief on appeal, an essential element of a contract is legal consideration. *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000); see also *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991) ("It is a fundamental principle of contract law that a [contractual] promise . . . is not binding if made without adequate consideration."). However, even if the contract between the parties to settle the pending lawsuit was rendered unenforceable by defendants' failure to tender the requisite consideration,[5] I am not persuaded that plaintiff's proper recourse was relief from judgment under MCR 2.612(C)(1)(f).

As this Court recognized in *Heugel, supra* at 478-479, for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be met: "(1) the reason for setting aside the judgment must not fall under subsections a through e,[6] (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." Further, relief is usually granted under subsection f only where the judgment was obtained as a result of the improper conduct of the party in whose favor it was rendered. *Heugel, supra* at 479. Likewise, subsection f was not drafted with the intention that it would "'relieve a party of the necessity for protecting his interest by normally prescribed procedures.'" *Stallworth v Hazel*, 167 Mich App 345, 356; 421 NW2d 685 (1988), quoting *Kaleal v Kaleal*, 73 Mich App 181, 189; 250 NW2d 799 (1977).

Under the circumstances of this case, I am of the view that the trial court abused its discretion in setting aside the order of dismissal on the basis of MCR 2.612, given that the record is devoid of "extraordinary circumstances" warranting the trial court's action, *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 393; 573 NW2d 336 (1997); *Tomblinson v Tomblinson*, 183 Mich App 589, 595; 455 NW2d 346 (1990), or evidence of improper conduct on the part of defendant that resulted in obtaining the initial judgment of dismissal. *Heugel, supra*; *Kaleal, supra*. Indeed, the parties do not dispute that the order of dismissal was the result of a settlement agreement reached through a fair and equitable bargaining process.[7] Further, although plaintiff intimates in her brief on appeal that the settlement that formed the basis for the order of dismissal was derived from defendant's fraudulent conduct, there is no record support for her otherwise unsubstantiated claim.[8] As this Court concluded in *Marshall v Marshall*, 135

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[5] A contract is rendered void by lack of consideration. See, e.g., *Yerkovich, supra* at 741; *Reed v Citizens Ins Co of America*, 198 Mich App 443, 449; 499 NW2d 22 (1993).

[6] However, in *Heugel, supra* at 481, this Court concluded that relief under subsection f is appropriate "even where one or more of the bases for setting aside a judgment under subsections a through e are present, when additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand."

[7] Notably, the settlement agreement does not contain a provision providing for the reopening of the litigation in the event consideration was not tendered.

[8] The present case is therefore distinguishable from our Court's decision in *Coates v Drake*, 131 Mich App 687; 346 NW2d 858 (1984), where extraordinary circumstances were found to exist where the plaintiffs' attorney negotiated and accepted a settlement on their behalf without their consent or knowledge, and further stipulated to an order of dismissal regarding the plaintiffs' claims.

Mich App 702, 712; 355 NW2d 661 (1984), in considering the predecessor to subsection f, "a contract bargained for by two equally positioned parties is well outside the reach of this provision of the court rule." Further, where the moving party does not allege improper conduct by the nonmoving party in obtaining the judgment, relief is inappropriate under subsection f. *Id.*

> The thrust of [MCR 2.612(C)(1)(f)] is clearly to free courts from the fetters of a set of specifically delineated bases for relieving from default whenever *manifest injustice or an unconscionable result* flows from the [judgment]. *McDonough v General Motors Corp*, 6 Mich App 239, 246; 148 NW2d 911 (1967) (emphasis supplied).]

I am not persuaded that plaintiff demonstrated manifest injustice or an unconscionable result to the extent that the trial court was warranted in granting relief from judgment and reopening the litigation once the voluntary order of dismissal was entered. Therefore, I agree with defendant that because the trial court's July 9, 1999, default judgment necessarily followed its earlier decision to set aside the voluntary order of dismissal with prejudice, the order should be reversed.[9]

I would reverse and remand for proceedings consistent with this opinion.

/s/ Peter D. O'Connell

[9] Given the resolution of this issue, I need not address defendant's alternate arguments on appeal.